United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

SAMUEL SANCHEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLANT SANCHEZ

GUSTAVE H. NEWMAN
Attorney for Appellant Sanchez
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066

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STATEMENT OF THE CASE

The appellant was indicted in the United States District Court for the Eastern District of New York under Indictment No. 72 CR 996. The indictment charged one count of violation of Title 18, U.S. Code, Section 1708, possession of stolen mail. He was convicted after a non-jury trial before the Honorable Edward Neaher, and sentenced to 18 months' imprisonment with execution of the sentence being suspended and he was placed on probation for three years. He filed a timely Notice of Appeal.

THE FACTS

On January 24, 1972, a body search was conducted of the appellant. The body search was conducted pursuant to a search warrant (A-3)*, issued by a Magistrate in the Eastern

*"A" references with numbers after it refer to pages of the Appendix.

District of New York. On the same date, an automobile in which the appellant was alleged to have driven up was also searched without a warrant pursuant to an alleged seizure for the purpose of confiscation. The warrant and the search were for materials which "are evidence of a policy betting business" operation of which would violate the appropriate State and Federal statutes.

During the course of the search of appellant's person, slips of paper were found in his pocket with certain numbers written on them. In the appellant's sock were found certain bank books and checks relevant to the indictment. The body search took place in a bar, and then the agents searched an automobile which they allege the appellant was seen arriving in. In the automobile, they allegedly found four checks drawn on various banks, relevant to the indictment. They did not arrest the appellant on the date of the search and seizure. On August 19th, 1972, the appellant was arrested on a Magistrate's complaint and charged with possession of property stolen from the mails. He was indicted on September 21, 1972 in a one (1) count indictment which charged him with possession of seven (7) items allegedly stolen from the mail, which items were the product of the search and seizure on January 24, 1972. The items were numbered 1 through 7 in the indictment. Items 1 through and including 3 were taken from his person; items 4 through and including 7 were taken from the automobile. A motion to suppress was made on behalf of the appellant, and it was

stipulated that the hearing thereon should also be considered the trial of the indictment. As previously indicated, the appellant was convicted.

The evidence consisted of the testimony of the F.B.I. agents, one of whom executed the affidavit and supervised the search and the other who actually executed the search and seizure.

AGENT MICHAEL C. FITZGERALD:

He testified that he furnished the information for the affidavit upon which the search warrant was issued. That the affidavit involved (A-5) was for the appellant and at least five other individuals, at least two locations and one automobile. He was present at the search and directed the agents to seize the bank books and the checks which were the basis of the instant indictment. He thought the checks were evidence of payouts.

AGENT SHAWN RAFFERTY:

He searched the appellant and testified to what he found on his person and in the automobile. He testified that in his opinion the checks and bank books were stolen and there was some outside chance they had something to do with gambling, but that the stolen property idea was paramount based on the fact that the checks and bank books were not in the appellant's name.

The appellant stipulated to the testimony of the purported makers, and payees of the checks and also to the parties named in the bank books. The material seized was offered into evidence. The warrant and affidavit were offered

into evidence.

The appellant did not testify and offered no witnesses.

The Trial Court rendered a written decision and opinion (A-18).

POINT I

THE SEARCH AND SEIZURE CONDUCTED AT BAR WERE UNLAWFUL.

The sole basis for the search and seizure from the appellant's person was the search warrant (A-3). The testimony of the agents is clear that there was no probable cause to arrest the appellant on January 24, 1972 and, therefore, we need not concern ourselves with any foundation for the search as incidental to a lawful arrest. Not that it is necessarily dispositive of the basic issue of whether there was or was not probable cause for an arrest, the fact is that the agents did not arrest the appellant on January 24, 1972. The search and ensuing seizure, we submit, must rise or fall on the validity of the search warrant.

Examination of the warrant indicates that several key areas of it were left blank at the time the warrant was issued by the Magistrate and executed by the agents on January 24, 1972.

Amongst the areas left blank was any reference to the affiant upon whose affidavit the warrant was to issue; the name of the party to be searched; the District within which the search was to be executed.

In addition to the omitted material, the so-called "commanding" paragraph refers back to one of the blanks. That is, it commands a forthwith search of the "person named", and as previously indicated, no name is provided in the body of the warrant.

The Fourth Amendment mandates in its relevant portion:

> ". . . and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41 (c) of the Federal Rules of Criminal Procedure, in effect at the time of the issuance of this warrant, provided as follows:*

> "Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

Rule 41(c) in effect at the time of the issuance of this warrant required that the warrant contain the name of the person upon whose Affidavit the warrant was issued. At bar, of course, no name was stated for the affiant upon whose Affidavit the warrant was issued.

*The amendment to 41 (c) was enacted April 24, 1972 and became in effect October 1, 1972.

In U.S. v. Kaplan, 286 F Rep 963 (1923 - Southern District of Georgia), the Court held that the warrant should be full and complete in itself and that if the name of the person is known it should be stated. In King v. U.S., 282 F2d 398 (1960 - Fourth Circuit), the Court held that the requirements for the issue of a search warrant must be strictly adhered to. The Court went on to recognize the purpose for the requirements in Rule 41 for the affiant's name. The Court set forth two specific reasons, one that someone must take responsibility for the facts alleged and, two to enable an aggrieved person to probe and challenge the legality of the warrant. The Court went on to cite with approval U.S. v. Kaplan (supra) and stated at page 400:

> "It is established well that the warrant would be fatally defective if no name were mentioned."

In U.S. v. Carignan, 286 F Supp 284 (1967 - District Court of Massachusetts), the Court stated that where a warrant was originally issued based on one agent's Affidavit and later a second agent made an Affidavit that was not reflected in the warrant, the warrant was not valid.

In U.S. exrel. Pugh. against Pate, 401 F2d 6 (1968 - Seventh Circuit), the use of a fictitious name for an informant who executed the Affidavit was held to invalidate the search warrant. The Court in exrel. Pugh. (supra) cited with approval King v. U.S. (supra) and the general proposition of strict construction of warrants and the requirements for the issuance thereof. The Court also cited with approval at page 8 the

language previously referred to from U.S. v. Kaplan (supra) to the effect that the absence of an affiant's name would render the warrant defective.

We are aware of cases to the contrary from other Circuits, eg., U.S. v. McCoy, 478 F2d 176 (1973 - Tenth Circuit) and U.S. v. Soriano, 482 F2d 469 (1973 - Fifth Circuit). These cases turn on the interpretation that it was a technical non-compliance and that the amendment to Rule 41 (c) deleted the necessity for the affiant's name.

I could find no cases on point eminating from the Second Circuit Court of Appeals.

I would suggest that the reasoning of cases such as McCoy and Soriano (supra) is not applicable at bar for the reason that this search warrant omits many other things and, therefore, the absence of the name of the affiant should not be viewed alone, but in the totality of this warrant. The other specific items that are missing will be dealt with in greater detail at a later point in this brief, but they include the name or description of the person to be searched, the district or area within which the search is to be performed, and the warrant executed, as well as the name of the affiant.

The Fourth Amendment, by its terms, requires a particular description of the place to be searched and the person to be seized. At bar, that portion of the search warrant which would ordinarily contain the name of the person to be searched or a description of him is blank. The Trial Court held that this was not fatal reasoning that since the caption of the

search warrant read "U.S. against Samuel Sanchez" that was sufficient designation. I submit that that is an over-simplification since in many cases the party to be searched or the premises to be searched bear no relationship to the caption of the search warrant. For example, many search warrants are captioned "U.S. against John Doe". Under the Court's construction, would that mean that an agent executing a warrant could search any male if the name or description was omitted from the body of the warrant?

I recognize the suggestion that a practical approach be adopted in construing warrants. U.S. v. Ventresca, 300 U.S. 112, 85 S.Ct. 741 (1965). I submit in this case, the facts go beyond this general statement. This warrant on its very face ignores the mandate of the Fourth Amendment which requires the specificity previously alluded to. It further ignores the requirements of Rule 41 (c) then extant in that it omits the name of the affiant or party responsible for the warrant.

The warrant contains no designation or direction from the Magistrate as to where it is to be executed. On the face of the warrant it purports to authorize a search and seizure of an unnamed person based upon the Affidavit of a nameless person anywhere in the world. It seems by its contents, or to be more exact, by the absence of its contents, to fly in the face of the long line of cases which held that it is desirable to have the Magistrate determine when searches and seizures are permissible and what limitations should be placed on such activities. See: U.S. v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420 (1932); Trupiano v. U.S., 334 U.S. 699, 68 S.Ct. 1229 (1948).

The law is clear that warrants are to be strictly construed and that the guarantees of the Fourth Amendment are to be liberally construed to prevent impairment of the protection extended by the Amendment. Grau v. U.S., 287 U.S. 124, 53 S.Ct. 38 (1932).

To overlook all of the deficiencies on the face of this warrant on the pretext of a practical approach, it is suggested, makes a hollow mockery of the Fourth Amendment, Rule 41 (c) and all of the cases which purport to preserve the protection of the Amendment and the Rule.

POINT II

THE SEIZURE WAS INVALID BECAUSE THE MATERIAL SEIZED WAS NOT ENUMERATED IN THE WARRANT.

The search warrant specifically identified the material sought to be completely related to what is commonly referred to as "policy gambling" under New York State statutes.

The material which was introduced into evidence in this particular case was bank books, checks and other materials related to bank deposits. These items were not described in the warrant.

In Marron against United States, 275 U.S. 192, 48 S.Ct. 74 (1927), the Court dealt with a search warrant that sought intoxicating liquors and articles for their manufacture. In executing the warrant, the agent seized ledgers showing business entries. The Court held the seizure of the records invalid, stating that the warrant must particularly describe what is to be seized and seizures outside the provisions of the warrant constitute a general search and are impermissible. In reliance on Marron (supra), the Court of Appeals decided in U.S. against LaVallee, 391 F2d 123 (1968 - Second Circuit) that a warrant for key making machines, blank keys, etc. did not permit the seizure of newspaper articles referring to burglaries. In so doing, the Court relied upon and quoted with approval at page 126 the following language from Marron (supra) (at 196 or 76 of the Supreme Court citation):

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

In U.S. v. Dzialak, 441 F2d 212 (1971 - Second Circuit), the Court suppressed from introduction into evidence microscopes, opera glasses and telescopes on the grounds that these items were not specifically designated in the warrant. In doing so, the Court rejected the government's reliance on Warden v. Hayden, 387 U.S. 294 (1967). The Court relied upon Marron (supra) and Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506 and quoted with approval at pages 216 and 217 the following language from Stanford (supra) (which appeared at pages 487 of 379 U.S. and page 509 of 85 S.Ct.):

> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers and effects' from the unbridled authority of a general warrant."

It should be noted in passing that the very basis used in Marron (supra) for justifying the search, ie., incidental to a lawful arrest, is not available at bar. No arrest was made in the instant case until many months later and the only basis for stopping the appellant was to execute a search in accordance with a search warrant. It is further submitted that none of the exigent circumstance exceptions are available

and the material involved was clearly not contraband per se. The agents admitted that the compelling reason was that they thought it associated with gambling activities. The Court can almost take judicial notice of the fact that "policy" gambling involves quarters, half dollars and small denomination wagers and is never accompanied by formal financial transactions evidenced by checks or bank books.

The Trial Court, in its decision in reference to this point, placed its reliance upon Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971). I submit respectfully that reliance is misplaced. The prosecution in Coolidge (supra) endeavored to support their search on a plain view theory. In Judge Stewart's opinion, he dealt with the argument that material in plain view during a search pursuant to a warrant may be seized even if not referred to in the warrant. He stated his analysis by stating the problem with the "plain view" doctrine in a search warrant situation, ie., to define those situations where the material is truly in "plain view" and not merely discovered as a concomitant of the search. It went on to hold that if the original justification is legitimate, its extention is only legitimate (emphasis supplied)

> ". . . where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."
>
> (91 S.Ct. at 2035).

The balance of Judge Stewart's analysis of the proposition turns on the fact that the police officers could or should have anticipated what was to be seized and, therefore, should have included it in the warrant. That is admittedly not the case at bar, but we need not reach that question. Here, the only authority for a search was the warrant. The material to be seized was that involved in policy gambling. There was no basis in fact or law to seize the checks or bank books. It was not evidence; it was not any instrument of a crime; there was no nexus between the items seized, the warrant, the crime alleged and the material specifically described in the warrant. Even Judge White's dissent in Coolidge (supra) does not support the seizure of the checks and bank books at bar. He would authorize the search and seizure in Coolidge (supra) based upon it being incidental to a lawful arrest and within the permissible area of search, attendant to a lawful arrest. He also justified a search and seizure incidental to a lawful arrest if the material is in plain view. In all his situations, he presupposes in effect "probable cause" either for the arrest or for the seizure. Here, of course, there is no probable cause for the arrest or to link the items seized with any crime. Therefore, I submit that Justice White's dissent does not support the seizure at bar.

The Trial Court went on to rely upon U.S. v. Pacelli, 470 F2d 67 (1972 - Second Circuit). I submit respectfully this reliance is misplaced. In the decision in Pacelli (supra),

Judge Hays, writing for the Court, stated on page 70, in reliance upon Coolidge (supra):

> "Both the majority and dissenters found that where a police officer has a warrant to search a given area for specified objects, and in the course of the search comes across some other article of incriminating character, the property is seizable under the plain view doctrine." (Emphasis supplied).

At bar, I submit what was seized was not of incriminating character under the facts of this case or any other basis.

Judge Hays went on to indicate that the material seized must be material, or "relevant evidence of a closely related" drug activity. In this case, there was no connection between what was sought and what was seized.

The Trial Court also relied upon U.S. v. Robinson, 94 S.Ct. 467 (1973). That case dealt with a search incidental to an arrest and authorized a full search as being proper when incidental to a lawful, custodial arrest. The Court went on to authorize the seizure, by stating at page 477:

> "Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct."

Once again, the test was the nature of the material seized. In this case, the items seized do not fall within any of the three categories, referred to in the Robinson case (supra).

The case of Gustafson v. Florida, 94 S.Ct. 488 (1973), which was decided on the same day as Robinson (supra), rests

on the same basis, ie., a full search is permissible when incidental to a lawful custodial arrest.

The Court went on to justify the seizure in the following language appearing on page 492:

> "Having in the course of his lawful search come upon the box of cigarettes, Smith was entitled to inspect it; and when his inspection revealed the homemade cigarettes which he believed to contain an unlawful substance, he was entitled to seize them as "fruits, instrumentalities or contraband" probative of criminal conduct."

At bar, the items seized do not fit within those categories and beyond that, since the search is pursuant to a warrant, they do not fall within the items described therein nor by any stretch of the imagination is there any nexus between them and the items or crime described in the warrant.

It is, therefore, respectfully submitted that the seizure at bar of items not specified in the warrant, or connected to the crime alleged therein, or material or relevant thereto, or per se contraband or instrumentalities of the crime was unlawful and should have been suppressed.

C O N C L U S I O N

THE CONVICTION SHOULD BE VACATED AND THE MOTION TO CONTROVERT THE SEARCH WARRANT GRANTED, THE MATERIAL SEIZED SUPPRESSED, AND THE INDICTMENT DISMISSED.

GUSTAVE H. NEWMAN
Attorney for Appellant Sanchez
522 Fifth Avenue
New York, New York 10036

Telephone: (212) MU 2-4066

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Attorney(s) for

UNITED STATES ATTORNEY
MAR 13 10 42 AM '74
EASTERN DISTRICT
OF NEW YORK